

Principles and legal aspects of academic draft on responsive regional regulation formation

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Abstract

Regional Regulation obliges to contain a regulation obeyed by its society, and to support this it is very necessary to understand the desires and social conditions of society until be implemented in the long term. Therefore philosophical considerations should be clear where the society will be carried to. To achieve responsive regional regulations in favor of regional autonomy, the legislators should pay attention to the principles of legislation formation as a frame of reference such as clarity of purpose, institutional based or forming organs proper that is fit between the type and content of material. The principle of the legislation formation in the framework of the autonomous regions must be conducted in accordance with the mechanism or process that has been specified in Law No. 12 Year 2011 on the Establishment of Legislation. As for the legal aspects of academic texts in the formation of local regulations have significant values and strategically in the legislation formation because the arrangement of academic draft begins with researching the values that exist in the community hence the bigger the possibility the legislation derived from academic draft will be accepted by society.

Keywords: academic draft, regional regulations, responsive

1. Introduction

The development of the legal field has shown significant progress and has conferred contribution to the achievement of the development objectives. However, putting into realization that progress achieved was not yet strong enough to face the challenges that exist, that fulfill society's demands and strictness of global competition. In its implementation, various legislation either at central and local levels, there are still hindrances in efforts to achieve justice and public order. In fact, series of legislation has been invalidated either by the Constitutional Court Law and Regional Regulation by the President through the Minister of Home Affairs.

Based on those problems, it is understood that the establishment of legislation is not just a matter of mere *legal drafting*, but including fundamental issues, namely how the law would be invented is a good law. In the sense that good legislation is basically set justice or correspond with reality or society legal awareness and legitimacy as well as referring to the hierarchy of legislation.

One of the efforts in improving the quality of legislation that is responsive to the development of society or create a legal situation that actually living in the community, surely suppose to be supported by research and legal studies thus later will be utilized as legal materials in preparing legislation both national and local levels.

The invention of a Regional Regulation (Perda) must possess a regulation which can be adhered to by society, and to glorify this therefore it is very necessary to understand the desires and social conditions of society that can be implemented in long term. Therefore philosophical considerations should be clear where the society will be carried to. To achieve responsive regional regulations in favor of regional autonomy, the legislators should pay attention to the principles of the formation of legislation as a frame of

reference such as clarity of purpose; institutional based or forming organs proper that is fit between the type and the content of material and so forth.

In the Science of Legislation, academic draft are prerequisite to draft legislation. Pursuant to Law No. 12 Year 2011 Article 1 Number 11 stated academic draft is the text of the research or legal studies and other research results to a specific problem that can be justified scientifically on setting up the matter in a legal draft, Regional Regulation Province draft, or regulation District / City draft as a solution to the problems and needs of the legal society.

In regard to the academic draft, it is one form of embodiment of the principles of the formation of good legislation. Besides, the existence of academic draft is including an application of the principle of conformity between the type and content of the formation of good legislation regulation as well (Article 5 of Law No.12 Year 2011 on Establishment of Regulation on Legislation, State Gazette Republic of Indonesia in 2011 No. 82, Additional State Gazette Republic of Indonesia No. 5234). "Thus academic draft can be used as the basis of a study to determine the substance of the Act and through the study and preparation of academic draft; it is expected legislation which was formed to fulfill the goal of establishing, workable and enforceable" (Yuliandri, 2009) ^[12]. From the various reasons for the existence of Academic draft legislation including the regional regulation, of course, will determine the benefits and power behavior of the regional regulation. The more complete those data and information obtained in the preparation of regional regulation, the more accurate and qualified those regional regulation formed.

Therefore, the establishment of modern legislation, including Regional Regulation, is inseparable from the existence of supportive elements that a variety of data and information, as well the conditions of the past as a lesson for today's

problems need to be solved and the conditions that desirable (Wicipto Setiadi, 2011) ^[10]. Thus, the academic draft has an important role in the formation of legislation.

In connection with that, the author proposes the issues to be studied are how the principle of academic draft in the formation of responsive regional regulations? And how the legal aspects of academic draft in the formation of responsive regional regulations?

2. Discussion

a) Formation Principles of Responsive Regional Regulation

Based on Law No. 23 Year 2014 on Regional Governance stipulated that the position of Regional House of Representatives (hereinafter "DPRD") is important, because they occupy local government element in local governance. Position of DPRD as the Regional Legislative Body domiciled in parallel and partner of local authorities, as well as performs the function of control or supervision upon Local Government. Pursuant to Article 101 paragraph (1) of Law Number 23 Year 2014 on Regional Government, that the duties and authority of DPRD, as follows (Article 101 Law No. 23 Year 2014 on Regional Government, State Gazette Republic of Indonesia in 2011 No. 82 Additional State Gazette Republic of Indonesia No. 5234) :

DPRD has the duty and authority to:

- a) Establish a joint Provincial Laws along with governor;
- b) Discuss and approve the Provincial Regulation Draft on provincial budget proposed by the governor;
- c) Carrying out supervision of the implementation of Provincial Laws and provincial budgets;
- d) Selecting the governor;

Propose the appointment and dismissal of the governor to the President through the Minister regarding the authentication appointment stated in Law Number 12 Year 2011 on the Establishment of legislation that set some principles referring to the establishment of regional regulation as follows:

- 1) Discussion of the regional regulation draft conducted by DPRD along with the Governor / Regent / Mayor
- 2) The regional regulation draft that has been approved by DPRD is settled by the Head of Regions to be Regional Regulation;
- 3) Regional regulation in the form of autonomy in administration, the assistance assignment as well as accommodating special regional conditions and / or further elaboration of higher legislation.
- 4) Regional Regulation should not be contrary to the public interest, other legislation, or higher legislation.
- 5) Regional legislation may include provisions such burden coercion cost of law enforcement or imprisonment of six months or a fine of up to five million rupiah.
- 6) Decree of the Head of the Region is settled for implementing regional regulation.
- 7) Prevailing regional regulation and the decree of the Head of the Region is stipulated in regional draft.

Regional regulation is all rules invented by the local government to execute other higher regulations degree (Bagir Manan, 2001) ^[2]. Therefore, generally the material in regional regulation involves contents as follows:

- 1) Substances relating to domestic areas and matters relating to the organization of local government;

- 2) Matters related to the duty and assistance (*Mendebewindl*) thus regulation is a legal product of the local government in order to implement regional autonomy, the exercise of the right and authority to regulate and manage their own internal affairs.

Observing the contents of regional regulation, it implies that if in processing these regulations or implementing it, it is expected that the regulation supposes to invent purposes to society, especially to accommodate local wisdom. Formulating the regional regulations in accordance with the above principles will eventually avoid complicated regional regulation. This can be achieved through the creation and discussion of academic texts as a support or the beginning of the formation for local regulations.

Hence, the needs of collective wisdom of either of Local Government, DPRD and society in making legislation in regional level by first preparing an academic draft before designing local regulations (Mahendra Putra Kurnia, *et al.*, 2007) ^[5]. Therefore academic draft describing the reasons, facts or background regarding matters that encourage the formulation of a concerning problem and urgent to be settled in regional regulation. The benefits of the data or information contained in the background displayed on formation of regional regulation is that they may detect certainly on why it is necessary to create regional regulation and whether the local regulation is urgently needed by society (Ali Sadikin, 2008) ^[1]. With these principles will materialize responsive regional regulations. Responsive nature contains the meaning purpose that the responsive law is useful to society. Responsive type of law by A. Mukhtie Fajar has two prominent features, namely: a) shift the emphasis from the rules to the principles and objectives; and b) Importance of populist character, both as an objective law and how to achieve it (W. Riawan Tjandra and Kresno Budi Darsono, 2009) ^[11].

b) The Legal Aspects Academic Draft in Formation of Regional Regulation

In the context of Indonesia, Law is obliged to be the forefront commander and guard in guaranteeing all the rights of its citizens. In Article 1 subsection (3) of the Constitution of the Republic of Indonesia Year 1945 mentioned "Indonesia is a country of law". This concept is a first step for the democratic process that emphasizes the efforts of the people and the wider society. In Article 1 subsection (2) of the Constitution of the Republic of Indonesia in 1945 mentioned "Sovereignty belongs to the people and carried out according to the Constitution". It is an obvious and fundamental ontology that people as the primary goal that must be guaranteed welfare. Epistemology can be implemented by the government is the application of academic draft as a form of people participation in the process of drafting legislation, including the establishment of regional regulation.

The purpose of law generally can be divided into three (3) terms as follows (Titik Triwulan Tutik, 2006) ^[6]: *First*, According to Jeremy Bentham in his book "introduction to the morals and legislation" that the purpose of the law is to provide benefit and wherever as possible to bring greater beatitude for society. Law aims for the sake of usage that surely be enjoyed by every citizen in the highest level possible. *Second*, according to ethic law theory is solely intended to achieve justice and uphold a sense of justice. In

this context there is a distributive justice which means justice that serves something in return to each person according to his services. And commutative justice means justice by giving something before everyone massively without seeing his services. *Third*, according to Arief Bernard Sidharta as quoted by Mochtar Kusumaatmadja that the law aims to realize the lack of legal certainty. Purpose of law is to protect human passively (negative) by avoiding arbitrary action. As active implemented law (positive) by creating societal condition humanely and possible societal progress properly. In the spirit of compromise and politics John Morley had controlled over his concern over what he called "*the spirit of political victory that he defines it as inadvertently omitted principle and politician readiness toward each line to hide and compromise in a political party*" (David Runciman, 2012) [3].

Hikmahanto Juwana argued that substantially the academic draft contain some significant parts. *First*, is the purpose of legislation drafting. The purposes and the reasons for establishing legislation are diverse. This is closely related to legal politics for the purpose of establishing the legislation that is a translation of the legal politics. *Second*, is the discussion in regard what items would be regulated. This section should be described accurately and incisively to reckon what would be the charge of material in the legislation. To replenish this section, the academic draft should be consulted intensively with the parties who are capable to current condition to be regulated. *Third*, is the passage of legislation factor. In practice frequently legislation cannot be implemented. This condition occurs because it is not followed by an in-depth study by taking into account the needs of society in the real sense. Thus, should an academic draft also contain a study of infrastructure support in terms of an enacted law. *Fourth*, references. Academic draft need to be elaborated on references relating to draft legislation that will be invented. It aims to avoid overlapping regulations both horizontally and vertically, as well as for the harmonization and synchronization of various laws existing in the process of establishing legislation (Hikmahanto Juwana, 2006) [6]. In the event of overlapping rules, then this is where seen the establishment of legislation which has been troubled from the start.

Based on the above description, it can be understood that an academic draft may also have implications on the establishment of regional regulations in the legal national system. Structurally the implications of an academic draft is directed to the Regional Regulation, hence formally Regional Regulation is legislation formed by DPRD by approval along with Head of Regional. Besides formal juridical, through amendments of 1945 Constitution, the Regional Regulation is settled a strong constitutional ground whilst in the constitution Article 18 subsection (6) states that, the Regional Government reserves the right to stipulate Regional Regulations and other regulations to implement autonomy and co-administration.

The provisions on the substance of the Regulation, further reinforced in Law Article 14 No. 12 Year 2011 on the Establishment of Legislation stipulated that, "The substances of Provincial Regulation and District Regulation / City containing the content in the framework of organizing regional autonomy and co-assistance as well accommodate regional certain conditions and/or extended explanatory to the

higher legislation."

In this regard, Jazim Hamidi and Sheen Mutik states that: "In *Stufenbaudes Recht* approach taught by Hans Kelsen, positive law (regulation) is constructed tiered and multi-layered, low regulation comes from and cannot be permitted contrary with higher regulations. Thus mentioned theory later in the science of law fell to the principle of "*lex superior derogate legis inferiori*" (Jazim Hamidi and Kemilau Mutik, 2011) [4]. Therefore academic draft into a pendulum balance, academic draft usage is to provide equilibrium between executive party and legislature party. This was stated by Jazim Hamidi and Sheen Mutik which declared that (Jazim Hamidi and Kemilau Mutik, 2011) [4]:

"In the formation of regional regulations, the regional regulations draft proposed by the Head of Regional and DPRD to be more objective and non-colliding rules against existing law, and if every regional legislation draft filed and accompanied by academic draft, it will be maintained neutrality and purity because the regulations are aimed to answer the demands of the legal needs of the society, neither because of the demands and interests of the government and the political elite through the existing politics law."

Furthermore, in relation to state Legal Concepts (State law) and law in society (*Living law*), Jazim Hamidi and Sheen Mutik (2011) [4] explaining that:

"As the pendulum counterweight, academic draft in accordance to invent good legislation, obliged to hand over the full recognition and protection of either legal system prevail and thrive in the society. The government must be able to accommodate the prevail laws of life (living law) both as a legal institution, the legal principles and legal traditions of the people (*folk law*) into national law (state law). The living law is expressed in the form of legislation that is touchable directly to individuals and communities within the society. This is called positive law.

Besides, academic draft as the establishment of legislation formal procedure until it results the academic draft as a part of the steps obliged to be implemented in legislation formation. The existence of the stages that have been determined and conducted in transparently, thus society may elect and choose various steps in legislation formation that attracted them. The procedure is part of accountability in the legislation formation.

When forming the legislation through various stages must be passed in accordance with the existing provisions, the process of legislation formation in which has high values to be accountable to public. Yet, if there were stages in legislation formation remaining, then the process of establishing such legislation will have a less value to be accountable to public. Subsequently, referring the procedures passed properly is an integral part of accountability form to public in formation of legislation in a country of democracy (Saifudin, 2009) [8].

The regional government should clearly avoid repressive regulations. A repressive government powers formed if these powers do not contribute attention to the interests of the governed, that is, neither when a power is exercised under interests of the governed, or to deny their legitimacy (Philippe Nonet and Philip Selznick, 2010) [7].

3. Conclusion

As closing, Author can conclude two important points as follows: The principle of the formation of autonomous regions in the regulation framework must be conducted in accordance with the mechanisms or processes that have been specified in Law No. 12 Year 2011 on the Establishment of Legislation. As for the legal aspects of academic draft in the formation of regional regulations consisting with values that are very significant and strategic in legislation formation that is good for academic draft begins with researching the values that exist in society that it is probable the legislation invented by the academic draft will be accepted by society, therefore, an academic draft should be a necessity in the formation of local regulations whilst the legal implications of academic draft as Pendulum Balancing and academic draft as formal procedure of a regional regulation establishment.

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